Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	
	)	CS Docket No. 01-290
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

REPLY COMMENTS OF CABLEVISION SYSTEMS CORP.

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Cablevision Systems Corporation ("Cablevision"), by its attorneys, submits these reply comments in the above-captioned proceeding.[1/]

INTRODUCTION AND SUMMARY

The evidence in this proceeding overwhelmingly demonstrates that competition has taken firm root in the multichannel video programming distribution ("MVPD") marketplace. In every other competitive segment of the economy and virtually every other medium of communication, bargained-for exclusivity is presumptively in the public interest because it enhances competition and diversity. Accordingly, there is no basis for reimposing the ban on exclusive contracts between cable operators and vertically-integrated satellite programmers.

1/ *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, CS Docket No. 01-290 (rel. Oct. 18, 2001) ("*Notice*").

Commenters who favor reimposition of exclusivity restrictions on cable operators fail to meet the heavy burden established by Congress to justify such a result. These commenters would deny consumers the benefits of exclusive arrangements or reserve those benefits solely for themselves. Indeed, they favor reimposition of the ban precisely because it handicaps cable operators while allowing competitors to continue to reap the benefits of exclusive agreements where it is in their interest to do so. To justify this competitive disparity, the ban's supporters evoke a multichannel video programming marketplace "dominated" by cable operators. Such a marketplace no longer exists, if it ever did.

In contrast to the speculative harms posited by supporters of the exclusivity ban, parties favoring a sunset premise their case on empirical and economic data demonstrating the competition and diversity in the distribution of video programming today. These data underscore the contrast between the strong and vigorous competition in the video programming distribution business today and the marketplace that existed a decade ago, when Congress enacted the program access requirements. Since 1992 --

- cable's market share has dropped nearly 20 percentage points, and the number of non-cable MVPD subscribers has grown nearly tenfold to well over 20 million;
- DBS subscribers have increased from zero to more than 17 million; the two largest DBS operators are now the third and sixth largest MVPDs in the nation; and DBS operators have outpaced cable operators with respect to signing up new customers for the last five consecutive years;
- new terrestrially-based competitors have emerged, and two such providers -- RCN and Wide Open West -- offer service to millions of homes in local metro markets all around the country, and rank among the nation's top 15 MVPDs;
- the total number of cable programming networks has nearly quadrupled, and the number of programming services offered nationally that have no cable ownership has increased from 45 to over 200; and
- the percentage of national programming services that are vertically integrated has been cut in half, and the number of vertically integrated networks among the top 15 most watched cable programming services has dropped by more than 50 percent.

Sunset supporters also demonstrate how exclusive arrangements typically promote consumer welfare. Exclusivity strengthens investment incentives, promotes efficient distribution arrangements, and fuels more vigorous competition among distributors, all of which result in generating more choices and better prices for consumers. By contrast, comments favoring the ban are long on how permitting exclusivity might inconvenience particular *competitors* but short on how it would enable cable operators to foreclose *competition*.

Commenters with a track record of creating, developing and investing in new programming services uniformly support a sunset of the exclusivity restriction. Those in favoring of retaining the ban -- including the Bell operating companies and giant satellite operators -- have invested nothing in programming over the past ten years despite the obvious financial wherewithal to make those investments. They would nonetheless deny consumers the wider choice of programming services that exclusivity would make possible, consigning the public to copycat offerings of the same content and calling that pale imitation of competition sufficient.

Other commenters urge the Commission to go beyond its statutory charter and extend the ban to terrestrially delivered programming. Not only is such a step unnecessary and well beyond the scope of this proceeding, it also would contravene the express language of section 628, as the Commission itself has acknowledged. While section 628(c)(5) would not preclude a partial sunset of the exclusivity ban, the proposals proffered by RCN would provide no meaningful relief to vertically integrated programmers hamstrung by the prohibition.

Rather than grapple with the competitive implications of the four-fold increase in market share gained by alternative MVPDs since 1992, supporters of the exclusivity ban refer to "problems" in the sports programming marketplace that are theoretical rather than real. There is, in fact, a wealth of sports programming available for distribution by all MVPDs. Indeed, many industry observers attribute the growth and success of DirecTV to the breadth of its sports programming offerings, which include professional sports programming that is unavailable for distribution by cable operators. With respect to professional sports programming in the New York City area in particular, only a relative handful of games are distributed exclusively by cable operators. The local professional sports programming carried by Fox Sports New York and MSG is available to all distributors, and a wide array of sports programming is available from national and local outlets not affiliated with Cablevision, including the recently-established Yankees Entertainment and Sports ("YES") network.

The weight of the empirical and economic data available to the Commission demonstrates that program access rules are not necessary to preserve and protect competition in the market for video programming distribution. Allowing the exclusivity ban to expire will lead to more investment and competition in programming services and more vibrant and vigorous competition among MVPDs. The Commission should decline to re-impose the exclusivity prohibition, and thereby help to usher in a new era of competition in video programming.

I. EXPIRATION OF THE EXCLUSIVITY BAN WILL BENEFIT BOTH COMPETITION AND CONSUMER WELFARE

Numerous commenters agree with Cablevision that exclusive arrangements are commonly employed in virtually all sectors of the economy, subject only to the antitrust laws, because such arrangements enhance consumer welfare by promoting efficient distribution arrangements, product diversity, and greater competition among distributors.[2/] Exclusivity is a particularly common feature of the communications and media business, underscoring the

[2/] AT&T at 9-10; Comcast at 9-12; NCTA at 15-16.

anomaly of the restriction set forth in section 628. As Comcast observes:

> Government generally does not require that the content distributed by media and entertainment entities be made available to competitors; rather, competitors in these markets are expected to either negotiate for it in the open market or, better yet, develop or support the development of new content. This benefits the public by encouraging the creation of a diverse marketplace of ideas and expression. Government does not, for example, require WRC-TV to make its news reports available to WJLA-TV, or require the Washington Post to make David Broder's columns available to the Washington Times, or require the Fox Networks to provide "The Simpsons" to the CBS Network or CBS affiliates. Instead, these competitors distinguish themselves in their respective markets by investing in exclusive content.[3/]

In the media and entertainment business, exclusivity spurs content distributors to seek out and obtain distinct content, thereby expanding distribution opportunities for content providers and fueling more diverse choices for consumers.

Proponents of the exclusivity ban -- none of whom have ever developed a programming service of their own -- ignore the benefits of exclusivity[4/] and disparage support for sunsetting the exclusivity ban as motivated by the cable industry's anticompetitive animus toward rival distributors.[5/] Indeed, the Joint Parties apparently believe that no programmer would ever consider entering into an exclusive arrangement for any reason other than capitulation to alleged cable operator market power.[6/] As Cablevision, other commenters, and even the Commission itself have pointed out, however, there are a host of pro-competitive reasons for programmers to enter into exclusive arrangements with cable operators that enhance consumer welfare by

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3/ Comcast at 9-10.

4/ RCN at iii ("there is no reason for concern that the exclusivity provision chokes creativity or mitigates the economics of program development); EchoStar at 12; Joint Parties at 23-26.

5/ Qwest at 6 ("The MSOs support a sunset for one reason one reason only – to deny competitive, landline, start-up MVPDs access to the programming they need to be successful"); Joint Parties at 25-26 ("Exclusivity . . . is 'necessary' only to incumbent cable operators who wish to ensure that their competitors do not have full and fair access to programming").

6/ Joint Parties at 9.

promoting programming diversity and intensifying competition among rival distributors.[7/] Indeed, the lack of the ability to offer exclusive deals inhibits investment and innovation by depriving vertically-integrated programmers, even relatively smaller ones like Rainbow Media Holdings, of a negotiating tool available to its competitors.[8/]

EchoStar ignores these consumer benefits, extolling a "relatively undifferentiated" MVPD marketplace where all providers offer "roughly the same menu of program offerings."[9/] It is easy to see how EchoStar is better off in this scenario, but consumers, diversity and innovation are ill-served by competitive rivals offering only undifferentiated products. As Comcast notes, the availability of the programming EchoStar now seeks a government right to distribute is a direct result of the decision by cable operators in the 1980s to invest in new television content that was distinct from the fare then offered by broadcasters.[10/] The undifferentiated product model of competition lauded by EchoStar turns programming into nothing more than a commodity and therefore does little to foster diversity and innovation.

EchoStar's transparent attempt to make a virtue – and a government policy[11/] – out of its own unilateral business decision not to invest in programming stands in stark contrast to "the cable industry's contribution to programming content when it was at the same stage as DBS today."[12/] While EchoStar makes clear its desire to free ride on the programming investments

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7/ Cablevision at 8-10, 15-19; AOL Time Warner at 16-18; Comcast at 10-11.

8/ Cablevision at 10-15.

9/ EchoStar at 6-7.

10/ Comcast at 10-11; Cablevision at 13-14.

11/ *Cf.* EchoStar at 7, 9 (arguing that the FCC has pushed the industry in the direction of "competing over price with an undifferentiated product").

12/ Comcast at 10. *See id.* at 10-11 (noting that "by around 1980, when the entire cable television industry served approximately 15 million subscribers, cable investment in programming had already made by others,[13/] smaller rivals such as Cablevision continue to risk capital and resources developing new programming content. EchoStar clearly has the resources to create its own programming, as its ability to finance the acquisition of Hughes demonstrates, and its strengths in this regard have only been augmented by its recent infusion of capital from Vivendi.[14/] Letting the exclusivity ban sunset would end EchoStar's ability to "free ride" on others' programming investments and force it to consider programming investment and development among the possible uses of its substantial resources.

DirecTV's assertions that there is no evidence that the exclusivity prohibition has harmed program diversity is flatly incorrect.[15/] Cablevision provided examples of how the prohibition has hampered distribution of several of Rainbow's newer, more niche-oriented services.[16/] In the same vein, iN Demand notes that it may be unable to offer certain content in part because "distributors are concerned that their competitors will gain access to the programming, and this 'free riding' significantly reduces the value of the programming to the distributors."[17/] As iN Demand explains, the exclusivity prohibition places some content providers in the position of

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resulted in the launch of" more than a dozen new services, including HBO, The Movie Channel, Showtime, Superstation TBS, C-SPAN, Nickelodeon, TLC, USA, Bravo, Cinemax, CNN and MTV).

[13/] *See* Cablevision at 17 & n.37; AT&T at 12 (noting statement by EchoStar official that "confirms EchoStar's significantly diminished incentive to produce its own original programming" or to underwrite the risk of independent programmers to do so, because the program exclusivity provision gives it a "'free ride'"); Comcast at 11.

[14/] *See* "Why Vivendi Did the Dish," <www.time.com> (Dec. 17, 2001) (discussing Vivendi's investment in EchoStar).

[15/] DirecTV at 5-6; *see also* Joint Parties at 23. DirecTV also suggests that the Commission's pre-approval process for exclusive agreements between cable operators and vertically-integrated programmers alleviates the potential adverse impact of the exclusivity restriction on program diversity. *See* DirecTV at 5-6. As Cablevision and other commenters point out, however, the costs, delays, and uncertainties attendant to the Commission's pre-approval process vitiate its efficacy as a realistic business option. Cablevision at 6-7, n.8; Comcast at 12; iN Demand at 16, n.45.

[16/] Cablevision at 11-13. *See also* Comcast at 11-12 ("Although the rule may not have entirely halted the development of new programming, it certainly has foreclosed the viability of programming services that would have depended on exclusivity to gain a foothold in the market"); AT&T at 11-13.

having to either produce high-cost, high-quality programming without assurances of gaining the level of distributor promotion necessary to recover the costs of production, or to reduce the amount of capital invested in programming content and services. Regardless of which outcome prevails, consumer welfare is harmed because "the exclusivity prohibition will have unnecessarily skewed the business decision, so that the programming will not be provided, or will be provided in a substantially diminished form, thus reducing the amount and diversity of programming available to consumers."[18/]

While DirecTV acknowledges the benefits of exclusivity,[19/] it apparently arrogates those benefits for itself and other non-cable MVPDs. Indeed, DirecTV trumpets its exclusive sports and concert offerings in marketing and promotional materials.[20/] Likewise, EchoStar's marketing materials also note exclusive content available via its service.[21/] There is no justification for continuing to enable these formidable competitors to take advantage of a discriminatory regulatory regime that denies basic economic tools to their rivals.

Proponents of reimposing the exclusivity ban fail to meet their statutory burden of showing that the ban is necessary to preserve and protect competition in the distribution of video programming. An outcome that requires more MVPDs to invest in their own programming services is not evidence of harm to competition.[22/] Quite the contrary, spurring distributors to create and develop new and distinct content will enhance the competitiveness of the marketplace

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17/ iN Demand at 14-15.

18/ *Id.* at 15.

19/ DirecTV at 7.

20/ *See*, *e.g.*, "Hoops Package Clears Blackout Hurdle," *Multichannel News* (Dec. 20, 2001) (quoting DirecTV senior vice president of programming's statement that the opportunity to air basketball games not available on cable is "important to DirecTV maintaining its position as the premiere distributor of sports programming"); Cablevision at 7-8, 27.

21/ *See* Comcast at 14.

22/ *Cf.* DirecTV at 4; EchoStar at 10; American Public Power Association at 4.

and consumer welfare with it.[23/] While there may have been some question whether MVPDs other than cable operators had the strength and financial wherewithal to make such programming investments a decade ago, there can no longer be any doubt regarding their strength and viability today. The Commission should now lift the exclusivity ban, allowing market forces to foster a new surge of programming innovation and diversity, and rely on the antitrust laws to deter and remedy any anticompetitive conduct that may arise.

II. THERE IS NO EVIDENCE THAT REIMPOSING THE BAN IS NECESSARY TO PRESERVE AND PROTECT COMPETITION AND DIVERSITY IN THE MARKET FOR THE DISTRIBUTION OF VIDEO PROGRAMMING

Commenters favoring sunset of the exclusivity ban highlight the dramatic changes in the MVPD marketplace that have occurred over the last ten years which preclude cable operators from using exclusivity to harm competition.[24/] As NCTA notes, the number of non-cable MVPD subscribers has grown nearly tenfold since late 1992, when Congress enacted the exclusivity restriction.[25/] DBS subscribers have grown from zero at the time the program access provisions were enacted to more than 17 million as of October 2001.[26/]

The growth of non-cable MVPDs continues unabated. In the year 2000, DBS grew twenty times faster than cable, and DBS continues to gain almost 8,500 new subscribers each day -- more than triple the number of new customers it attracted in 1994.[27/] New terrestrially-based competitors to cable have emerged as well, such as RCN, Knology, Wide Open West and

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23/ Cablevision at 15-18; AT&T at 13-15; Comcast at 10-11.

24/ *See* Cablevision at 29-35; AOL Time Warner at 7-11; AT&T at 6-15; Comcast at 7-13; iN Demand at 4-8; NCTA at 10-11.

25/ NCTA at 6.

26/ Comcast at 6.

27/ AT&T at 18; AOL Time Warner at 8-9.

Qwest. Together, these new entrants' networks pass millions of homes and offer consumers in most major metropolitan markets another source of video programming.[28/] Based on subscriber numbers, RCN and Wide Open West rank among the top fifteen MVPDs in the country.

The quantitative and qualitative data presented by sunset supporters to demonstrate the remarkable growth in MVPD competition over the last ten years stands in sharp contrast to the archaic picture of the marketplace and speculative harms proffered by those who favor reimposing the exclusivity ban. First, proponents of the ban understate -- or ignore altogether -- the significance of the competition that has emerged in the last ten years. RCN, for example, characterizes cable's market position as "frightening,"[29/] notwithstanding the fact that cable's share of the MVPD business has fallen from over 95% to 77% in the last ten years, while non-cable MVPDs have gained more than a four-fold increase in their market share during the same period.[30/] EchoStar, which did not exist a decade ago and now stands on the verge of becoming one of the largest MVPDs, asserts counterfactually that nothing about cable's market position "has changed at all" in the past ten years.[31/] Similarly unsupported assertions by the Joint Parties and the Rural Independent Competitive Alliance that competitive conditions have "become materially worse" since 1992 [32/] stand in stark contrast to recent judicial assessments of the

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28/ *See*, *e.g.*, "SBC Sells Americast Cable Overbuild Systems to Wide Open West," *Warren's Cable Regulation Monitor* (May 28, 2001); "West Point, Ga.-Based Cable, Internet Company Gains Customers Quickly," *Columbus Ledger-Enquirer* (Aug. 3, 2001); "Starpower Wins Approval in Prince George's County, Maryland to Provide Competitive Cable Television Service," <www.starpower.net/news/11-00/11-22-2000>.

29/ RCN at iii.

30/ *See* Cablevision at 22; NCTA at 4-11; AOL Time Warner at 8-9 (noting that DBS gains almost 8,500 new subscribers each day -- more than triple the number of new customers it attracted in 1994).

31/ EchoStar at 4.

32/ Joint Parties at 5-6; Rural Independent Competitive Alliance at 2-4.

competitiveness of the marketplace by both the D.C. Circuit and the Fourth Circuit Court of Appeals.[33/]

Seren asserts that "vertical relationships that dominated the market in 1992 have become further entrenched,"[34/] ignoring the fact that AT&T recently sold its Liberty programming holdings and Viacom is no longer an MSO. Indeed, the number of vertically integrated networks among the top 15 most watched cable programming services has been cut in half since 1992 even as the number of programming networks has nearly quadrupled.[35/] As NCTA observes, there are now more than 200 programming services offered nationally by satellite that have no cable ownership.[36/]

Commenters advocating retention of the exclusivity ban barely acknowledge the rapid growth of DirecTV and EchoStar over the last ten years, and none grapple with the competitive significance of the proposed merger of the two into a company larger than any existing cable operator. To the contrary, the Independent Multi-Family Communications Council asserts that "[t]he sheer number of eyes that a horizontally concentrated MSO is able to offer a programmer gives the MSO bargaining leverage against the programmer that cannot be matched by non-cable competitors."[37/] By this yardstick, however, both EchoStar and DirecTV already have more leverage than Cablevision, and their power will increase substantially if the two merge. No

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33/ *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001); *SBCA et al. v. Federal Communications Commission et al.*, 2001 U.S. App. LEXIS 26120 (4th Cir. Dec. 7, 2001) (discussing extensive evidence of growth in satellite subscribership, including as compared to cable subscribership).

34/ Seren at 5. *See also* Broadband Service Providers at 8.

35/ Cablevision at 4; NCTA at 11-13.

36/ NCTA at 11.

37/ IMCC at 3.

longer can putative disparities in size between cable companies and alternative MVPDs be used as justification for imposition of the exclusivity ban.

Commenters that now insist today's market lacks competition have argued specifically to the contrary in other contexts to serve their own ends. While EchoStar asserts here that a fully competitive MVPD market "has not yet materialized," it simultaneously argues in support of its merger with DirecTV that the market should be considered competitive, due to competition from cable, satellite, C-Band operators, and cable overbuilders.[38/]

The MVPD competition that has emerged in the last ten years -- particularly the national competition provided by EchoStar and DirecTV -- subjects all cable operators to the discipline of market forces, and thereby precludes any cable operator from having the ability to successfully engage in anticompetitive foreclosure schemes.[39/] This competition cannot be dislodged by the removal of the exclusivity ban, but will, in fact, be invigorated by such a step.

<u>Second</u>, commenters supporting a reimposition of the exclusivity ban base their demands on unfounded speculation about cable operators' behavior in the absence of such a ban, without regard either to the strong market incentives for cable-affiliated programmers to continue to sell to non-cable MVPDs or to the continued applicability of the antitrust laws to deter and punish

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[38/] Testimony of Charles Ergen, CEO, EchoStar Communications Corporation, Hearing of the Telecommunications and The Internet Subcommittee of the House Energy and Commerce Committee (Dec. 4, 2001); *see also* Testimony of Charles Ergen, CEO, EchoStar Communications Corporation, Hearing of the House Judiciary Committee (Dec. 4, 2001) (insisting that C-Band is a credible competitor to DBS). Other satellite distributors have similarly acknowledged that "competition among the cable and satellite industries is working very well for the American consumer" and "competition has worked extremely well in providing American consumers choice, innovation, and value in multi-channel video." Testimony of Marshall W. Pagon, Chief Executive Officer, Pegasus Communications Corporation, Hearing of the Telecommunications and The Internet Subcommittee of the House Energy and Commerce Committee (Dec. 4, 2001).

[39/] Cablevision at 20-28; Comcast at 4-6; NCTA at 10.

anticompetitive conduct.[40/] As demonstrated in Cablevision's initial comments and the accompanying economic analysis submitted by Economists, Inc., the growth of competition in both the MVPD and programming markets over the last ten years renders it uneconomic for cable operators to enter into exclusive contracts with vertically-integrated cable programmers for the purpose of foreclosing competition.

The reality of today's video programming marketplace is that no cable programming network -- vertically integrated or otherwise -- can afford to turn its back on the more than 20 million subscribers served by alternative MVPDs. AOL Time Warner observes that "there are powerful economic incentives for AOLTW to provide its popular cable networks to the widest possible audience," and NCTA likewise explains that widely viewed networks that denied their services to those competitors would forgo significant revenues" from subscription fees as well as advertising sales.[41/] Given these market realities, there is little risk that allowing the ban to sunset would lead to anticompetitive withholding of programming. Moreover, as Cablevision and other commenters note, even after a sunset of the exclusivity ban, the antitrust laws would continue to exist as a backstop to preclude the type of anti-competitive conduct feared by supporters of the exclusivity ban. DirecTV itself acknowledges that the exclusivity ban's primary purpose was to "prompt" cable-affiliated programmers to "come to the table" and deal

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[40/] *See, e.g.,* Carolina Broadband at 5 ("if the prohibition on exclusivity were to lapse, cable providers could immediately take steps to limit their competitors' access to critical programming . . . effectively removing 35% of the satellite-delivered national programming networks – the 35% with the largest subscribership – from the reach of their competitors"); DirecTV at 3-4; Broadband Service Providers at 9; Gemini at 3-4 ("If the exclusivity prohibition is eliminated, there is little question but that new BSPs would be denied access to programming services controlled by vertically integrated MSOs.").

[41/] AOL at 10; NCTA at 14.

with alternative MVPDs.[42/] No such inducement is necessary any longer -- the "prompt" today comes in the form of the millions of subscribers served by non-cable MVPDs.

Carolina Broadband groundlessly claims that due to "their monopsony power," cable operators "also exercise undue influence over the remaining two thirds" of cable programming networks that are not vertically integrated.[43/] This claim is refuted by the actual marketplace facts, which, as Comcast notes, show that "the amount of programming offered by cable operators through exclusive arrangements is very limited, even with respect to non-vertically integrated programmers."[44/] NCTA similarly observes that "nearly all non-vertically integrated satellite-delivered program networks are available on DBS as well as cable even absent the applicability of the exclusivity ban to those services."[45/] The absence of a significant number of exclusive arrangements belies claims of cable's monopsony power.

Several commenters presume that a sunset of the exclusivity ban would prompt cable operators to collude in connection with program licensing and distribution in order to benefit themselves and disadvantage alternative MVPDs.[46/] Tellingly, none point to any concrete examples of such conduct, and none offer a convincing argument why the antitrust laws do not provide a sufficient check on such conduct. Further, the D.C. Circuit has already cautioned against promulgating regulatory decisions on conjectures about collusion among cable operators.[47/] Baseless assertions by supporters of the exclusivity ban that a sunset will prompt

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42/ DirecTV at 2.

43/ Carolina Broadband at 6.

44/ Comcast at 15.

45/ NCTA at 14-15.

46/ *See*, *e.g.*, IMCC at 3-4; Everest at 4-9.

47/ *See Time Warner v. FCC*, 240 F.3d at 1132.

cable operators to withdraw the lion's share of vertically integrated cable programming networks from alternative MVPDs represent precisely the type of speculative predictions that, in other contexts, Chairman Powell has suggested should *not* serve as the basis for Commission rules and policies.[48/]

Third, commenters supporting retention of the exclusivity ban fail to grapple with the four-fold increase of new, predominantly non-vertically integrated cable programming services over the last decade. Combined with the decrease by half in the percentage of vertically-integrated cable networks over the same period, the proliferation of programming has all but eliminated the competitive significance of access to any particular service.[49/] There are now over 200 programming networks that are not affiliated with any cable operator.[50/] As Comcast explains, "[t]hese facts demonstrate that the current competitive marketplace provides ample unaffiliated programming for all MVPDs, which Congress expected and intended to be the result of the 1992 Cable Act."[51/] Not only can any MVPD -- large or small -- compile programming packages from numerous and constantly increasing sources, but there are several networks to

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48/ *See*, *e.g.*, *Applications for Consent to the Transfer of Control of Licenses by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part, CS Docket No. 00-30 (Jan. 22, 2001).

49/ In the context of the Federal rules governing rate deregulation petitions, both Congress and the Commission consider "comparable video programming" to cable operators as being furnished by any competing distributor offering "access to at least 12 channels of video programming," including at least one channel of non-broadcast service programming. 47 C.F.R. § 76.905(g). No commenter has suggested that a sunset of the exclusivity ban would preclude any alternative MVPD from gaining access to programming well above this threshold level of comparability set by Congress and the Commission.

50/ NCTA at 11.

51/ Comcast at 7-8.

choose from in nearly every programming "category," including multiple news channels, children's' channels, sports channels, music channels, premium movie channels, and others.[52/]

Fourth, several commenters seek to justify continuation of the prohibition based upon the putative impact of a sunset on certain *competitors* rather than on preserving competition. For example, Gemini argues that the ban should be extended because broadband service providers need guaranteed access to all programming because building their networks is "extremely expensive" and "[t]he financial markets have been very difficult for more than a year."[53/] Braintree Electric asserts that the ban is "necessary to protect competition for small, facilities-based providers" and "is essential to the continuing viability of our video business."[54/] The Joint Parties go so far as to argue that the Commission should reenact the ban on exclusive contracts, because "the mere prospect that high-profile programming services . . . might be taken exclusive by the largest cable MSOs is more than enough to sour investors on terrestrial competition."[55/]

Congress did not authorize the Commission to reenact the exclusivity ban to protect any particular competitor, and Commission policy is generally designed to promote competition, rather than particular competitors.[56/] Congress decreed that the outcome of this proceeding

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52/ *See* Cablevision at 36-37. For example, Digital Broadcast Corporation's claim that to consumers, "cable isn't 'cable' if it doesn't include . . . CNN," Digital Broadcast Corporation at 7, is belied by viewership statistics. As of mid-December, Fox News was tied with CNN for both primetime and total-day ratings, and Fox News' households grew 120 percent in total-day delivery and 102 percent in prime time, versus only 46 percent in total day and 34 percent in primetime for CNN. "CNN, FNC Share Crown," *Multichannel News* (Dec. 24, 2001).

53/ Gemini at 4.

54/ Braintree Electric Light Department at 1-2.

55/ Joint Parties at 15-16.

56/ *See* 47 U.S.C. § 548(c)(2)(D) (authorizing the Commission to reenact the ban only if "necessary to preserve and protect *competition*") (emphasis added); *In re Applications of Pacific Telesis Group, Transferor and SBC Communications, Inc., Transferee*, 12 FCC Rcd 2624 ¶ 48 (The Commission's "priority is to promote efficient competition, not to protect competitors") (*citing SBC v. FCC* and cases should hinge upon whether reimposition of the exclusivity ban is a competitive necessity for the MVPD marketplace as a whole and not for any particular participant in that marketplace. As demonstrated herein, reimposition of the ban cannot be justified on the basis directed by Congress.

III. THE COMMISSION SHOULD REJECT PROPOSALS TO EXTEND THE EXCLUSIVITY BAN TO TERRESTRIAL PROGRAMMING OR TO RETAIN THE BAN IN UNTENABLE WAYS

A. There Is No Legal Basis or Policy Justification for Expanding the Program Access Rules to Cover Terrestrially Delivered Programming.

Several commenters argue that the Commission should use this proceeding to expand the scope of the program access rules to cover terrestrial programming and "competitive programming packages."[57/] There is no legal or policy basis for taking such action. As a threshold matter, the plain language of section 628(c)(5) limits the Commission's jurisdiction in this proceeding to a determination of whether or not retention of the exclusivity ban is necessary, and does not permit a decision to expand section 628(b) to cover terrestrially delivered programming.[58/] While its jurisdiction extends to those actions reasonably ancillary to performing its duties under the statute, the Commission cannot deviate entirely by creating new statutory obligations.[59/]

While the clearly delineated parameters of this proceeding dispose of requests to expand

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cited therein); *SBC Comm., Inc. et al. v. FCC et al.*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) ("The Commission is not at liberty . . . to subordinate the public interest to the interest of "equalizing competition among competitors").

57/ *See* Gemini at 2-5; Everest Midwest at 5; Seren Innovations at 20-22; American Public Power Association at 6; RCN at 29-35; Digital Broadcast Corporation at 4.

58/ The same rationale would compel rejection of World Satellite Network's request that section 628 be read to apply where there is "de facto" vertical integration between an operator and programmer. World Satellite Network at 6.

59/ *See Hi-Craft Clothing Co. v. NLRB*, 660 F.2d at 916 n.3 (an administrative agency may act only within its clear statutory mandate); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979) (FCC may not exceed the limits implemented by Congress).

the ban, the Commission in any event lacks the authority to expand the program access rules to cover terrestrially-delivered programming. Section 628(b) states that it is unlawful for a cable operator to "engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or customers."[60/] "Satellite cable programming" is "video programming which is *transmitted via satellite*."[61/] The plain language of section 628 thus limits its reach to programming that is delivered by satellite.[62/]

Some commenters assert that a more expansive reading of section 628 is warranted when a cable operator has allegedly moved an affiliated programming service to terrestrial delivery in order to evade the requirements of section 628.[63/] Such a reading also contravenes the plain language of the statute. The language of section 628 does not apply to programming *previously* transmitted via satellite.[64/] There is no evidence in section 628 that Congress intended to encompass movement of programming from satellite delivery to terrestrial delivery, even if it means that a competing MVPD is no longer guaranteed access to that programming pursuant to

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[60/] 47 U.S.C. § 548(b).

[61/] 47 U.S.C. § 548(i), referring to 47 U.S.C. § 605(d) (emphasis added).

[62/] *See, e.g., Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms); *Browder v. United States*, 312 U.S. 335, 338 (1941) (no argument has more weight in statutory interpretation than that a construction is within the plain meaning of the words of the statute).

The plain language of the statute further precludes an interpretation such as the unexplained assertion by Digital Broadcast Corporation that section 628 should compel access to "competitive programming packages." Digital Broadcast Corporation at 4.

[63/] *See*, *e.g.*, NRTC at 9-10.

[64/] *See In the Matter of DirecTV, Inc. and EchoStar Communications Corp. v. Comcast Corp.*, 15 FCC Rcd 22802 (2000).

section 628. To the contrary, Congress could have prohibited cable operators from moving programming from satellite to terrestrial delivery or required that program access obligations remain with programming that has been moved. It did neither, thereby vitiating any claim that such conduct violates section 628(b).[65/]

Carolina Broadband suggests that section 628 should be extended to cover terrestrially-delivered programming because cable operators otherwise receive a "boon" by being allowed to use a "lower cost and more reliable method of video programming distribution" not subject to the exclusivity ban.[66/] This suggestion is nonsensical. The Commission's policy should be to encourage, not discourage, the use of more efficient and reliable delivery methods.

Nor is there is any policy justification for extending the exclusivity ban to terrestrial programming.[67/] Indeed, Cablevision's recent experience in exhibiting a modest amount of regional sports programming as part of its cable-exclusive Metro local programming service highlights the benefits of a regulatory regime that does not presumptively restrict exclusivity. As the Commission itself has acknowledged,[68/] the sports programming available on Metro greatly facilitated both the launch and the public's awareness of this innovative service, which features a

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[65/] Further, where Congress meant to include authority to prevent "evasions" of provisions of the 1992 Cable Act, it did so explicitly. In section 623(h) of the Act (related to rate regulation), enacted simultaneously with section 628, Congress provided that "the Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions . . . of the requirements of this section." 47 U.S.C. § 543(h). The absence of specific authority to police evasions in section 628, where such authority is provided in other parts of the same legislation, cautions against assuming Congress intended the Commission to wield such authority. *See, e.g., Moshe Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1990); *Russello v. United States*, 463 U.S. 16, 23, 78 (1983).

[66/] Carolina Broadband at 9.

[67/] *Cf.* World Satellite Network at 7-8; Broadband Service Providers Association at 19; Carolina Broadband at 8.

[68/] *See RCN Telecom Services of New York, Inc. v. Cablevision Systems, Inc. et al.*, 14 FCC Rcd 17093, ¶ 23 (1999), *aff'd*, 16 FCC Rcd 12048 (2001).

wide range of content in addition to sports.[69/] And given the numerous professional sporting events still available to all MVPDs,[70/] the launch of Metro has not harmed the ability of Cablevision's rivals to compete in the New York area.

B. The Commission Should Reject Proposals to Narrow the Exclusivity Ban In Ways That Would Not Further Diversity and Innovation in Programming.

RCN's suggestion that the Commission relax the exclusivity ban in markets where the incumbent cable operator has less than a 50 percent market share or with respect to programming which "could be duplicated or replicated by a competitor through expenditure of its own resources"[71/] is untenable and would not promote diversity in video programming options.[72/]

RCN argues that the ban should remain in place "in any market in which a vertically integrated cable operator serves 50 percent or more of the local MVPD subscribers," because in such markets the cable operator should be presumed to have market power.[73/] The courts recently have rejected the idea that cable's market power can be determined solely by reference to market share, however.[74/] In any event, as demonstrated above and in Cablevision's initial

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69/ *See, e.g.*, "Rainbow Cooks Up Local Digital Content," *Multichannel News* (Nov. 20, 2000); "Metro Becomes MetroTV 'Turn on New York," *PR Newswire* (July 13, 2001). The Commission itself has previously recognized that exclusivity may be particularly useful for regional and local programming services due to the limited geographic reach of such services, which constrains the revenue potential of such programming. *New England Cable News*, 9 FCC Rcd 3231, 3238 ¶ 36 (1994); *NewsChannel, a Division of Lenfest Programming Servs., Inc.*, 10 FCC Rcd 691, 695 n.47 (1994).

70/ *See RCN*, 14 FCC Rcd 17093 ¶ 23.

71/ RCN at 36-39.

72/ Cablevision agrees that the Commission could decide to reimpose the exclusivity ban in part if it found that the facts mandated only a partial sunset of the ban. *See*, *e.g.*, *Terran v. Secretary of HHS*, 195 F.3d 1302 (Fed. Cir. 1999) (discretion to promulgate a revised vaccine table included the power to narrow vaccine injuries covered by the table, because the statute contained the requisite "intelligible principle" guiding the agency's discretion).

73/ RCN at 36.

74/ *See* n.33, *infra*.

comments, the combination of competitive inroads by non-cable MVPDs and the availability of the antitrust laws to prevent anticompetitive conduct render the anomalous exclusivity ban unnecessary today.

RCN's proposal to relax the ban with respect to programming that "could be duplicated or replicated by a competitor through the expenditure of its own resources"[75/] is also without merit. Just as attempts to define "essential" programming would enmesh the Commission into subjective and unproductive inquiries about the "value" of certain programming,[76/] attempts to define "duplicable" programming would be similarly unworkable.

IV. SPORTS PROGRAMMING DOES NOT RAISE ANY UNIQUE ISSUES REQUIRING SPECIAL SCRUTINY UNDER SECTION 628

Several commenters favoring retention of the exclusivity ban argue that there is a special problem with respect to the availability of sports programming for alternative MVPDs.[77/] Such claims are unavailing. A wealth of national and local sports programming is available for distribution by all MVPDs and will remain available.[78/] Commenters who assert that their competitive viability is under siege due to problems regarding access to sports programming

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75/ RCN at 37.

76/ *See, e.g.,* DirecTV at 9 (noting that determining which programming was "essential" would be unworkable, particularly given the fluctuations in audience ratings, and would raise First Amendment concerns); Everest Midwest at 7 (it would be "extremely difficult and subjective" to determine which programming services were "essential").

77/ RCN at 12-17; Joint Parties at 11-15; Seren at 11-20; Broadband Service Providers at 13-17.

78/ *See, e.g.,* "NBA, Disney Agree on TV Deal," *Los Angeles Times* (Dec. 15, 2001) (under new NBA contract, "there could be national telecasts six nights a week, double the number now offered"); "Hoops Package Clears Blackout Hurdle," *Multichannel News* (Dec. 10, 2001) (college basketball fans looking for "access to every minute of 'March Madness' will finally get their wish" thanks to a new DirecTV deal); "Baseball gets the bucks," *Broadcasting and Cable* (April 2, 2001) at 27 (the number of baseball games on broadcast and cable has increased from 3,122 in 1996 to 3,924 in 2001); "TV Games Abound," *Palm Beach Post* (July 2, 2000) (noting the significant increase in availability of sports programming over last few years such that there are now "25 to 30 games on a typical weekend").

offer little substantiation for these claims.[79/] RCN and others cite the New York City market as an example of difficulties allegedly faced by non-cable MVPDs in gaining access to local sports programming.[80/] In fact, the vast majority of local New York area professional sports programming, including events involving teams that are also exhibited on Metro, is available for distribution to all MVPDs and will continue to be for the foreseeable future.[81/] The New York market is saturated with sports programming from a range of outlets, including FSNY, MSG, ESPN, ESPN2, TNT, TBS, fX, ABC, CBS, NBC, Fox Broadcasting, WNYW, WPIX, and WLNY -- most of which are not affiliated with any cable operator. All of these outlets have been available for carriage by RCN. These circumstances hardly depict a crisis of access to sports programming in the New York City area for alternative MVPDs, and no commenter has demonstrated that access to every single game played by every team in any given local market is a prerequisite to competitive viability.[82/]

79/ *See* Joint Parties at 12-13 (citing as "evidence" of the sport programming "problem" an interview with Rupert Murdoch (who owns no cable systems) regarding sports programming in Asia and excerpt a Vanity Fair article discussing Comcast which the Cable Services Bureau and the Commission already have reviewed and rejected as not probative of harmful intent); Everest at 4-5 (complaining about its inability to obtain one college football game which, as it turns out, was not actually denied to Everest); Seren at 9 (claiming that a regional sports network that is carried on its system somehow constitutes evidence of an "exclusive programming 'stranglehold'").

80/ RCN at 11-15; Broadband Service Providers Association at 16-17; Seren at 15, n.10.

81/ *See* Cablevision at 36-37.

82/ RCN at 18. RCN claims that polling data "show that some 40-58% of cable subscribers would be less likely to subscribe to cable service if it lacked local sports programming." These data are of little value since, due to the ready availability of sports programming in New York from a wide variety of outlets, there is virtually no chance that RCN's subscribers would ever "lack[] local sports programming." Further, RCN provides no information on the methodology of this survey and fails to explain what "less likely" means, and even on their face, the data show a substantial number of subscribers to be indifferent to sports programming. *See also* 2001 Video Competition Report at Table D-7 (indicating that ESPN was not even among the top fifteen most highly-rated cable programming networks last year). More recent data shows that ESPN's average prime time rating ranks 10th out of the top 15 cable programming networks. *Cable Programming Investor*, October 5, 2001, at 4.

RCN and other commenters also cite a 1999 law journal article which asserts that "the Yankees have allowed Cablevision to preclude potential competitors from entering the New York market."[83/] Apparently, the author of this article was unaware that Cablevision faces competition from DirecTV, EchoStar, RCN and numerous SMATVs in the New York area. Likewise, RCN and other commenters citing this article overlook the fact that the Yankees decided against renewing their contract with Cablevision's affiliated regional sports network, MSG, and have instead opted to start their own network, YES.[84/] The sports programming landscape in New York is far more diverse and dynamic than is reflected in the monolithic view of the marketplace offered by RCN and other proponents of the exclusivity ban.

CONCLUSION

As demonstrated herein, and in Cablevision's initial comments, the exclusivity restriction of section 628(c)(2)(D) should not be reenacted.

83/ *See* RCN at 13 & n.29.

84/ *See* "Yankees, Nets, Devils Form new TV Network," <cbs.sportsline.com> (Sept. 10, 2001).

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January 7, 2002

CERTIFICATE OF SERVICE

I, Tara M. Corvo, hereby certify that on this 7th day of January 2002, I caused a copy of the foregoing "Reply Comments of Cablevision Systems Corp." to be sent to the following by hand delivery, or via the Internet by electronic mail (*):

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